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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

CARSON-TRUCKEE WATER CONSERVATION DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR STATE OF NEVADA

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QUESTION PRESENTED

Whether the courts below properly held that an award of attorneys' fees to the Petitioner was inappropriate under the Endangered Species Act where the case itself did not substantially contribute to Endangered Species Act goals and where the Petitioner did not substantially contribute to the goals of the Act.

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STATEMENT OF THE CASE[1]

The Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada filed this action in 1976 for mandamus under the Washoe Project Act (43 USC § 614, *et seq.*) seeking to compel the Secretary of the Interior and other federal defendants to enter into a contract to supply Plaintiffs a por-

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[1] The statement of the case by the Petitioner generally describes the litigation. We attempt here not to repeat facts accurately stated by Petitioner, but to correct misstatements of facts by Petitioner and to supplement the statement with relevant facts that have been omitted by Petitioner.

tion of the yield of Stampede Reservoir for M & I use in the cities of Reno and Sparks, Nevada. Pursuant to the Washoe Project Act Congress required that Stampede be used for irrigation, flood control, power generation, fish and wildlife and "other beneficial purposes". Congress limited fish and wildlife use of the Stampede water to $2 million out of a total expenditure of $52 million. 43 USC §§ 614(c)(d).

The federal defendants had commenced negotiations for a water supply contract with the Plaintiff Conservancy District during the 1960's but finally refused to proceed, alleging the government's trust responsibilities to the Pyramid Lake Pauite Indians and the Tribe's *Winters* reserved rights as a rationale for not proceeding with the contract negotiations. The Plaintiffs then filed suit.

The government answered the complaint, raising numerous defenses for its refusal to complete the contract, including the Secretary's discretion not to contract, the government's fiduciary duty to the Tribe and the Endangered Species Act.

The Tribe moved to intervene in the action on the ground that it was the equitable owner of the waters under the *Winters* doctrine, and that a sale of water to the Plaintiffs would interfere with the Tribe's plans to develop a commercial fishery in the lower Truckee River and Pyramid Lake.

The district court granted the Tribe's motion to intervene and the Tribe then raised several defenses as a bar to Plaintiffs' action including Plaintiffs' lack of standing, lack of a private right of action and the lack of authority of the Secretary to sell Stampede waters for M & I purposes. The Tribe also raised the Endangered Species Act issue that had been asserted by the government.

The district court, in its opinion denying the Tribe's motion for attorneys' fees found that the litigation did

not aid in interpreting the Act and that the Tribe's efforts did not substantially contribute to the goals of the Act. Pet. App. 5, 6. All parties stipulated that the Act was applicable and the only issue to be tried was the amount of water necessary to meet the needs of the fish. The district court found further:

> In addition, the Secretary had already commenced a program to help the qui-ui and Lahontan cutthroat trout. The Government had raised the defense of the ESA in its original answer and was actively and energetically participating in the trial of the case. The Tribe concedes that the counsel for the Government did a first-class job in defending the case, and that the Government made significant financial contributions towards its defense.
>
> The Tribe entered the case primarily for its own economic self-interest. Most of the issues it raised, particularly those of a technical nature like the standing of the plaintiffs, were not intended to, nor did they, assist in the interpretation or implementation of the Act. In fact, some of these defenses, if they had been successful, would have had the opposite effect.[2]

Pet. App. 6.

Based on its findings, the district court then concluded that the Tribe had not met the test promulgated by *Alabama Power Company v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) and *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982):

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[2] The district court's findings were based on substantial evidence and were not challenged by the Tribe on appeal. Although the Tribe, in its Petition for Writ of Certiorari, now attempts to argue that it made additional arguments and that the government did a poor job and took positions below contrary to the interests of the Tribe and the fish, none of these arguments has any merit and must be rejected where they are being raised for the first time in this Court.

> [T]he dominant consideration is whether litigation by [the party seeking attorneys fees] has served the public interest by assisting the interpretation and implementation of the statute.

Pet. App. 5.

On appeal the Tribe did not challenge any of the district court's findings or conclusions. The Tribe raised only two legal issues:

> 1. Whether the district court erred as a matter of law by applying the standard set forth in *Alabama Power Company v. Gorsuch.*
>
> 2. Whether the Tribe was entitled to an attorney's fee despite the fact that it was a defendant-intervenor and not a party "commencing" a suit "to enjoin a violation" of the ESA as required by 16 USC § 1540(g)(1).[3]

On appeal to the Ninth Circuit, the Tribe argued that this court's holding in *Ruckelshaus v. Sierra Club*, —— U.S. ——, 103 S. Ct. 3274 (1983) overruled *Alabama Power Company*, and like cases, and established a new test whereby a party need not contribute anything to the goals of the ESA, *i.e.*, so long as a party prevails on a central issue he is entitled to attorneys' fees notwithstanding his lack of substantial contribution.

The Ninth Circuit rejected the Tribe's argument and held that *Ruckelshaus* only ruled that a non-prevailing party was not *eligible* to be awarded attorneys' fees. That case did not, contrary to the assertions of the Tribe, overrule cases requiring contribution by a party seeking fees.

I. The Decision Of The Ninth Circuit In This Case Does Not Conflict With *Ruckelshaus v. Sierra Club.*

The issue before the court in *Ruckelshaus v. Sierra Club* was whether a *losing* party could be awarded at-

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[3] The Ninth Circuit rejected the Tribe's first argument and, thus, never reached the Tribe's second issue.

torneys' fees under the Clean Air Act when that party had advanced the purposes of the Act. The court held that a losing party is not eligible to receive attorneys' fees notwithstanding his contribution to the goals of the Act. *Ruckelshaus* did not hold, as contended by Petitioner, that a prevailing party is automatically entitled to an attorney's fee as a matter of law. That is a fatal flaw in the Petitioner's argument.

Ruckelshaus did not disrupt existing care law requiring a party to make a contribution. Thus, after *Ruckelshaus*, in order for a fee award to be deemed "appropriate", a party must not only prevail but he must also make a contribution.

The heart of the Tribe's Petition for certiorari is its argument that *Ruckelshaus* requires that a prevailing party be awarded an attorney's fee as a matter of law. This argument was rejected by the Ninth Circuit because there is nothing in *Ruckelshaus* to support it. Pet. App. 13, 14. By the same token, this petition for certiorari, which is based on the same argument, should be denied.

To award an attorney fee to a prevailing party "as a matter of law" flies in the face of the *Ruckelshaus* opinion wherein the court indicated that lower courts should have *discretion* in making fees awards:

> We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. *Differing abilities to bear the cost* of legal fees and *differing notions of responsibility for fulfilling the goals of the Clean Air Act* likely would justify exercising special care regarding the award of fees against private parties. 103 S. Ct. 3285, n. 12. Emphasis supplied.

II. The Ninth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

In order to find some basis for review by this court, Petitioner argues that the Ninth Circuit's decision conflicts with cases decided by the District of Columbia

Court of Appeals and the Third Circuit Court of Appeals. Petitioner's position is that those courts have promulgated two standards: one for prevailing parties (who are entitled to attorneys' fees as a matter of law) and another for losing parties (who must contribute to the goals of the particular environmental act at issue).

Petitioner argues that in *Environmental Defense Fund v. Environmental Protection Agency*

> "no mention whatsoever was made of the substantial contribution test in the decision awarding attorneys' fees."

Pet., 19. Therefore, Petitioner reasons, a prevailing party must automatically be entitled to attorneys' fees. Petitioner fails to recognize that in *EDF v. EPA* the government did not contest the eligibility of EDF for an attorneys' fee award:

> Although EPA does argue that EDF's claims should be rejected for lack of adequate documentation . . . there is no real claim that EDF is not entitled to some amount of attorneys' fees. 672 F.2d 47, n. 2.

It would be highly unusual for a court to discuss the "appropriateness" issue where the party liable for the payment of fees has, in essence, stipulated that fees are appropriate. It should also be noted that *EDF v. EPA* is devoid of any suggestion that attorneys' fees should be awarded to a party who has not made a contribution toward the goals of the Act.

The Petitioner would have this court promulgate a new rule requiring a "losing" party to pay attorneys' fees whenever a "prevailing" party [4] *raises* an ESA issue,

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[4] In the instant case, the Respondents prevailed on all issues litigated against the Petitioner. *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D. Nev. 1982). Respondents did not prevail on the issue it litigated against the government regarding the quantity of water needed for the fish species. But,

regardless of whether that party ultimately makes any contribution toward the goals of the Act. Such a rule would not only overrule all existing case law regarding attorneys' fee awards, but would promote parasitic litigation by parties, and attorneys, only interested in obtaining fees without making a significant contribution toward the enforcement of environmental statutes.

The Petitioner's argument that the courts have set up two separate standards is frivolous and was carefully analyzed by the Ninth Circuit and rejected. The cases cited by Petitioner from the D.C. and the Third Circuit reveal that only one standard has evolved:

> . . . we believe our opinion makes clear that we have articulated *one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have "substantially contributed" to the goals of the . . . Act. 672 F.2d 42, n. 10 (emphasis in original).

This court should be especially skeptical of the motives of intervenors who attempt to extract large fees from litigation without making a substantial contribution. As was noted in *Alabama Power Co. v. Gorsuch*, an intervenor has a burden to show some "unique contribution:"

> If ever an intervenor can recover attorneys' fees from a party on whose side it participated . . . the justification would have to be a clear showing of some unique contribution of the intervenor to the strength of that party's legal position.

It is submitted that an intervenor should make a "unique contribution" regardless of the party from whom he seeks attorneys' fees.

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as found by the district court (which finding has never been challenged) this issue did not substantially contribute to ESA goals, Pet. App. 6.

III. There Are Additional Reasons For Affirming The Decision Below.

The district court and the Ninth Circuit held that it was not "appropriate" to award the Petitioner attorneys' fees in this case. Neither court was, thus, required to reach the alternative ground for denial of attorneys' fees raised by the respondents, i.e., that the Tribe did not comply with statutory prerequisites.

The Petitioner relies on 16 USC § 1540(g)(4) which provides:

> The court, in issuing any final order *in any suit*[5] *brought pursuant to paragraph (1)* of this subsection, may award costs of litigation (including reasonable attorneys' fees and expert witness fees) to any party, whenever the court determines such award is appropriate. Emphasis supplied.

"Paragraph (1)" of the subsection states that:

> any person may commence a civil suit . . . (A) to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. 16 USC § 1540 (g)(1).

The statute also provides:

> No action may be commenced under subparagraph (1)(A) of this section . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation.

No notice of any alleged violation was ever given by the Petitioner to either the Secretary or the Respondents.

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[5] Due to the arguments in the courts below, the Petitioner is, no doubt, very concious that it has never brought a suit pursuant to "paragraph (1)." Nevertheless, Petitioner omits important portions of this statute (*See*, Pet., 3) in an apparent attempt to avoid this argument.

In addition, no action was commenced "to enjoin" a "violation" of the Act.

The suit below was commenced by Respondents for mandamus to require the Secretary to deliver water under the provisions of the Washoe Project Act. The Respondents did not violate the ESA and agreed that the fish species were entitled to water from Stampede reservoir. The issue at trial concerned whether there was water available over and above the amount needed for the fish that could be sold for M & I purposes.

In the circumstances, the courts below could have denied attorneys' fees to the Petitioner on either of two grounds: First, that no attorney's fee was proper because the Petitioner did not commence a suit to enjoin a violation or give the notice required by the statute and, second, that attorneys' fees were not "appropriate". Both courts denied attorneys' fees on the second ground and did not reach the other ground. It is submitted that either ground was sufficient to deny attorneys' fees to the Petitioner.

IV. Awards Of Attorneys' Fees In Civil Rights Cases Are Not Relevant.

The Petitioner's final argument is that this court should apply the rules regarding awards of attorneys' fees in civil rights cases. Cases awarding attorneys' fees under Civil Rights laws are not germane, however, since they involve different considerations than cases construing environmental statutes. Generally, the *result* in a civil rights action is indicative of whether a person's civil rights were, or were not, violated. Thus, an inquiry into whether an attorney's fee is warranted in a civil rights case is entirely different from an environmental case where the *result* gives no indication as to whether a fee is "appropriate." It is not at all surprising that different tests have been applied in civil rights litigation than in environmental litigation. The civil rights cases cited by Petitioner have no bearing on this action and the courts

below correctly applied the rules developed by the D.C. Circuit in *Alabama Power*, *Sierra Club* and *EDF v. EPA*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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